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LAWYERS

MUTUAL WILLS AGREEMENTS

What is a Mutual Wills Agreement?

A Mutual Wills Agreement is a written agreement between two parties, usually husband and wife, where they each agree to make "mutual" or reciprocal Wills. The Agreement normally provides that each party will leave their estate to the other, on the condition that neither party will revoke or change their Will without the permission of the other party.



Why have a Mutual Wills Agreement?

It is a fundamental principle of law that a person may always revoke his or her Will. Sometimes the revocation of that Will may not even be deliberate. For example, a Will is revoked at law by marriage. Therefore a testator cannot simply rely on the fact that reciprocal Wills have been made, and should also enter into a Mutual Wills Agreement.

Mutual Wills Agreements resolve a testator's concern about protecting their children's inheritance in the event that they die before their spouse (especially where they have left their entire estate to their spouse).

In our experience, a common fear held by people is that, if they die having left their assets to their spouse, their spouse will remarry, and make a new Will naming his or her new partner as the beneficiary, and leaving the testator's children inadequately provided for. It is in situations like this that a Mutual Wills Agreement can help protect the interests of intended beneficiaries, and also provide peace of mind to a person when making a Will.



How do they work?

A Mutual Wills Agreement operates to create a trust in favour of the beneficiaries named in the Wills made under the Agreement. The trust 'locks in' the assets upon the death of the first party. This means that any change or revocation of the 'Mutual Will' made by the second party will not affect the gifts that were intended to be given to the beneficiaries under the 'Mutual Will'.



Any subsequent document which revokes or amends the 'Mutual Will' would still be legally valid, i.e. in the sense that it would be granted Probate, but it would not affect the assets subject to the trust held for the beneficiaries under the Mutual Wills Agreement.

In summary, a Mutual Wills Agreement creates a trust that exists despite any subsequent Will, and which results in the gifts being 'locked in' after the death of the first testator.



What happens if one party revokes their Will during the other's lifetime?

A person may only revoke a Will made under a Mutual Wills Agreement in circumstances where it is not unfair for them to do so. If one party has relied upon the 'Mutual Will' to their detriment (for example, conducting investments with their own money in the other party's name in the belief that his or her children would eventually inherit) the trust will 'lock in' the assets that were to be given under the 'Mutual Wills' even though both parties are still alive.



However, if one party revokes their 'Mutual Will' and the other party is aware of the revocation, has a reasonable opportunity to alter their own Will (should they choose to do so) and has not suffered any detriment, the general position is that a Mutual Wills Agreement will be of no effect.

A Mutual Wills Agreement will only 'lock in' assets where it is unfair to one party for the other to revoke their 'Mutual Will'.

Diminishing an Estate

Another common fear held by people is that after they have died, and the trust has 'locked in' the assets, the other party, in an attempt to avoid their obligations under the Mutual Wills Agreement, will attempt to diminish their estate by providing gifts to others during their lifetime, or by flagrantly wasting the assets.



This means that when the remaining party dies, there will be less to distribute. Such conduct may not breach the

Mutual Wills Agreement, but the assets intended to be distributed under the 'Mutual Wills' will have been spent or will have become worth less.

This situation can be guarded against to some extent in a properly drafted Mutual Wills Agreement. However, it is not possible to totally prohibit all assets from being sold or diminished. Parties can specifically provide in a Mutual Wills Agreement for certain assets not to be sold, but imposing such restrictions does not allow for any contingencies that may occur. For example, prohibiting the sale of the family home may have adverse consequences for a spouse later in life.

Can those I leave out of my Will still challenge it?

Yes. A recent decision in the High Court of Australia held that even though the Mutual Wills Agreement creates a trust which 'locks in' certain assets, those assets still form part of the testator's estate for the purposes of the Family Provision Act 1982 (NSW). This means that if a testator dies, their assets (before they pass to the remaining party and 'lock in' as trust property) could potentially be subject to a claim from an eligible person, (i.e. spouse, child, grandchild, or other dependent) if the testator has not made adequate provision for them.



A Mutual Wills Agreement, while very useful, will not act to supersede the powers of the Court in relation to family provision.

Where to from here?

As you can see from above, Mutual Wills Agreements can be complicated documents with wide ranging ramifications. We have expertise in Estate Planning, including drafting Mutual Wills Agreements.



If you would like to know more about Estate Planning, including Mutual Wills Agreements please do not hesitate to contact our office.



Heidtmann & Co Fact Sheets are published as a service to our clients and friends. Articles should be viewed only as a summary of the law and not as a substitute for legal consultation in a particular case. Your comments and questions are always welcome.

LEVEL 29, BT TOWER, 1 MARKET STREET, SYDNEY NSW 2000 TEL: (02) 9267 3388 FAX: (02) 9267 3688
E-MAIL: mailbox@heidtmans.com.au WEBSITE: www.heidtmans.com.au ADDRESS: PO Box Q77 QVB Post Shop NSW 1230

PARTNERS: DAVID HEIDTMAN, PETER CARKAGIS, ALAN McMURRAN, PENELOPE CABLE, MANUEL THEOS
CONSULTANT: WILLIAM MALOS **SENIOR ASSOCIATE:** MICHAEL TZIRTZILAKIS
ASSOCIATES: ANNE McDONALD, VANESSA MARQUEZ-VALLEJO, ADAM MAZZAFERRO